IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER REGARDING THE SCIENTIFIC PEER REVIEW PROCESS

COMES NOW, the Plaintiff, the State of Oklahoma ("the State"), and respectfully submits its Reply in Support of Motion for Protective Order Regarding the Scientific Peer Review Process as follows:

A. Background

1. Following Defendants' filing a certain Motion to Compel (Dkt. #2000), the State filed its Motion for Protective Order Regarding the Scientific Peer Review Process ("Motion for Protective Order"). Dkt. #2034. As part of that Motion for Protective Order, the State seeks relief from the Court to shield the State from producing any further confidential materials generated in connection with the confidential scientific peer review process. In support of the Motion for Protective Order, the State has demonstrated that harm is likely to result if such additional production is required. Specifically, the State has presented substantial evidence that disclosure of confidential peer review materials in the case: (a) can create a chilling effect on peer reviewers and their willingness to share opinions and information; (b) leads to active involvement of Defendants' lawyers in the peer review process and attempts by them to improperly influence the process; (c) leads to Defendants' lawyers' attempts to intimidate peer

review journals; and (d) can generally compromise the overall integrity of the peer review process.

2. Defendants filed their "Opposition to Plaintiffs' [sic] Motion for Protective Order Regarding the Scientific Peer Review Process" ("Response") on May 26, 2009. (Dkt. #2113.) In their Response, Defendants argue that the State's Motion for Protective Order should be denied based upon three main arguments: (a) Rule 26(c) balancing "has no application to discovery requests directed from one party to another" (Response at 3); (b) the State has improperly asserted the confidentiality interests of absent third parties; and (c) defense counsel's communications with the scientific journals at issue are "favored by the courts as speech benefitting the scientific community" (Response at 10). Defendants' arguments fail on all counts.

B. The "Balancing Test" Applies to Non-Party *and* Party Discovery

3. "While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of 'good cause,' the federal courts have superimposed a somewhat more demanding balancing of interests approach to the Rule." *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (citations omitted). Under this balancing-of-interests approach, in order to resist disclosure of confidential information, a party must first establish that the information is confidential and that its disclosure might be harmful. *Centurion Indus., Inc. v. Warren Steurer and Associates*, 665 F.2d 323, 325 (10th Cir. 1981). If this is demonstrated, then the burden shifts to the party seeking disclosure to show that the requested information is relevant and necessary. *Id.* Finally, the Court must balance the need for discovery of the confidential material against the claims of injury resulting from disclosure. *Id.*; 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2043, p. 559 (2d ed. 1994) ("If it is

established that confidential information is being sought, the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information.").

4. Defendants argue that courts only engage in this balancing-of-interests analysis when a *non*-party has sought a protective order. Response at 2 (asserting that "Plaintiffs [sic] mistake the protections afforded to non-parties against invasive discovery with the rules applicable to party discovery.") Rule 26(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> (1) *In General*. *A party* or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
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> ***
>
> (G) requiring that a trade secret or *other confidential research, development, or commercial information* not be revealed or be revealed only in a specified way . . .

Fed. R. Civ. P. 26(c)(1)(G)(emphasis added). Clearly, the Rule itself is not limited to third party discovery, and in fact, explicitly applies to parties. Not surprisingly, courts routinely conduct a balancing test analysis when one party seeks protection -- under Rule 26(c) -- from producing materials to another party. *See, e.g., Huthnance v. District of Columbia*, 255 F.R.D. 285, 296 (D.D.C. 2008); *Standard Process, Inc. v. Total Health Discount, Inc.*, 559 F. Supp. 2d 932, 944 (E.D. Wis. 2008); *MGP Ingredients, Inc. v. Mars, Inc.*, 245 F.R.D. 497, 500-501 (D. Kan. 2007). Thus, Defendants are simply wrong in their assertion that Rule 26(c) balancing applies only to non-party discovery. So long as the State properly raises a claim of confidentiality and shows

that production may be harmful, the Court should engage in the balancing test as outlined in *Centurion* and its progeny.

C. The State Has Its Own Confidentially Interests at Issue

5. Defendants are similarly mistaken in arguing that the State is improperly asserting the confidentiality interests of absent third parties. The State has its own important and genuine interests in maintaining the confidentiality of the scientific peer review process. First, the State's experts who have submitted manuscripts -- or will submit manuscripts -- to scientific peer review journals -- are direct participants in the confidential peer review process. As authors of a submitted manuscript, the State's experts are expected to keep reviewer comments confidential -- and in turn, the journals assure the authors that the process is kept confidential. For instance, the Cox Manuscript, which is the subject of the State's Motion for Protective Order, was submitted to the *Journal of the American Water Resources Association* ("JAWRA"). The JAWRA website provides a summary of its confidentiality policy:

> To provide for a *frank exchange of ideas* among professionals, and to *avoid any appearance of intimidation or coercion*, some degree of *confidentiality must be maintained* in the review process. JAWRA policy is to not disclose the names of the reviewers of a particular article. The only exception would be in the event of a court order requiring disclosure. Reviewers are, however, free to disclose their own roles as reviewers. AWRA regularly publishes lists of reviewers, thanking them for their work, but does not associate the names with particular papers.
>
> *Draft manuscripts and reviews are considered confidential, and* ***should not be distributed to those not involved in authoring or reviewing…***

Ex. A (JAWRA Confidentiality) (emphasis added).

6. Defendants argue that "[t]o the extent that there is any confidence to keep at all, that confidence belongs not to [the State] but the journals." Response at 7. Plainly, this is incorrect as the confidential nature of the process extends to the authors. First, as set forth in the Motion for Protective Order, communications between peer reviewers and manuscript authors

have been held to be confidential as a matter of law. *See, e.g., In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig,,* 249 F.R.D. 8, 13-14 (D. Mass. 2008); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.,* 2008 WL 4345158, at *3 (N.D. Ill. Mar. 14, 2008). Furthermore, manuscript authors not only have an interest in maintaining the confidentiality of the peer review process, but also have an independent duty to keep that process confidential. Defendants chide the State for allegedly failing to explain how the release of communications between the journal and authors would "upset [the] inner workings" of the journals. Response at 8. But, clearly, JAWRA's confidentiality policy encompasses the authors to assure that the review process is not compromised (*i.e.*, preserving the "frank exchange of ideas" and avoiding the appearance of intimidation and coercion). The State and the State's experts share these concerns and a corresponding interest in maintaining confidentiality.

7. The authors and the State also have an interest in upholding the integrity of the peer review process. As JAWRA notes, part of the rationale behind its confidentiality policy is to "avoid any appearance of intimidation or coercion." Without a protective order, avoidance of the "appearance of intimidation or coercion" is not possible. Indeed, as demonstrated throughout the State's Motion for Protective Order, counsel for Tyson has engaged in an open and aggressive campaign to intimidate and sway the journals to which the State's experts have submitted manuscripts. Such active interference from Defendants' counsel calls into the question the integrity of the process for the purposes of the ultimate editorial decision and, potentially, for the purposes of the Court's admissibility decisions under *Daubert.* For these reasons, the State has its own confidentiality interests independent of the interests of any absent third party.

D. Defendants' Asserted Interest in Communicating with Peer Review Journals Is Far Outweighed by the Potential for Harm

8. Lastly, Defendants claim that they are performing a service to the scientific community by providing their lawyers' arguments and statements to the scientific journals. Defendants go so far as to argue that a peer review process free of defense counsel's involvement is "of limited worth." *See* Response at 9. The State submits that just the opposite is true. That is, a scientific peer review process where trial counsel is actively involved is "of limited worth." *Id.*[1] As established, one of JAWRA's explicit goals is to "avoid any appearance of intimidation or coercion." Ex. A (JAWRA Confidentiality). As Dr. Teaf has explained, it is "extraordinarily irregular" for litigation counsel to seek to have his views "forced" upon a scientific peer review process. Dkt. #2034-10, ¶ 10. In Dr. Teaf's view, such outside interference from litigation counsel, if allowed, would "instantly, negatively and irretrievably subvert the technical review process." *Id.* (emphasis added).

9. Defendants attempt to equate their lawyers' slanted advocacy with the legitimate exchange of ideas between actual scientists. But this position defies intellectual honesty. As Defendants well know, lawyers have no valid place in the arena of scientific peer review. And defense counsel's communications with the journals were not calculated merely to provide scientific information. The communications go much further than that. The communications attempt to smear reputations, question the motives of the authors and even raise the specter of government corruption through wholly unsubstantiated conspiracy theories. *See, e.g.,* Dkt.

[1] In their Response, Defendants again raise several perceived deficiencies with the Cox Manuscript as submitted to JAWRA. The State has already addressed many of these allegations in its Motion for Protective Order. *See* Dkt. #2034 at 15-18. Again, the mere possibility of factual disputes between the parties does not justify Defendants' active intrusion into the confidential peer review process. The editorial board of a scientific journal is not the appropriate forum for lawyers to argue over their perceptions of scientific work product.

#2034 at 4-5. At a minimum, these communications create the appearance of intimidation and coercion and pose serious questions about the process from its inception. Defendants have no valid interest in presenting this type of communication to scientific journals. And whatever interest they do have is substantially outweighed by the State's interest in maintaining the confidentiality of the peer review process.[2]

10. Again, it is the State's belief that the scientists who conduct peer review evaluations on behalf of these journals are fully capable of doing their jobs without the input of lawyers. The work should either be published or not based on its merit -- not based upon overly aggressive and coercive arguments from counsel.

WHEREFORE, premises considered, the State respectfully requests that the Court grant its Motion for Protective Order over the objections of Defendants.

Respectfully submitted,

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[2] Defendants also again claim that the *Daubert* case provides a justification for lawyer interference in the scientific peer review process. Response at 10-11. As explained in the Motion for Protective Order, however, *Daubert* provides no support for lawyers to actively intrude upon the peer review process. *See* Dkt. #2034 at 13-14.

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